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No. 72-1410

In the

Supreme Court of the United States

OCTOBER TERM, 1972

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, AND SUCCESSOR TO EDWARD WEAVER, FORMER DIRECTOR OF PUBLIC AID, *Petitioner*,

vs.

JOHN JORDAN, et al., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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April 16, 1973

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IN THE

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No.

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, AND SUCCESSOR TO EDWARD WEAVER, FORMER DIRECTOR OF PUBLIC AID, *Petitioner,*

vs.

JOHN JORDAN, et al., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner Joel Edelman, Director of the Illinois Department of Public Aid, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 18, 1973.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported, and hence appears in the appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 18, 1973. No petition for rehearing was filed. This petition for certiorari was filed within 90 days of the date of the entry of the Court of Appeals opinion. The Court's jurisdiction is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED.

(1) Whether an action by a citizen for retroactive welfare payments between July 1, 1968, and April 16, 1972, against the State of Illinois is maintainable in view of the provisions of The 11th Amendment to the United States Constitution.

(2) Whether under standards established by this Honorable Court, only prospective application should be given to a judgment which holds that provisions of the Illinois Department of Public Aid manual permitting application for aid to the aged and blind to remain undecided more than thirty days for aid to the disabled more than sixty days are inconsistent with regulations promulgated by the Department of Health, Education and Welfare under the Social Security Act.

CONSTITUTIONAL PROVISIONS INVOLVED.

Eleventh Amendment to the United States Constitution.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of Subjects or another foreign State."

STATEMENT OF THE CASE.

John Jordan, plaintiff-respondent (hereinafter "plaintiff"), filed a complaint in the United States District Court for the Northern District of Illinois, individually and as representative of a class, seeking injunctive relief and damages for violations of federal welfare regulations against Edward T. Weaver and Harold O. Swank, former Directors of the Illinois Department of Public Aid; David L. Daniel, Director of the Cook County Department of Public Aid; and Edward J. Barrett, Comptroller of Cook County, defendants-appellants (hereinafter "defendants").

Specifically, plaintiffs alleged that Section 4004, and sub sections thereunder, of the Illinois Categorical Assistance Manual (set forth in the Record at page 169) were invalid as being inconsistent with thirty-day and sixty-day determination requirements as defined by the United States Department of Health, Education and Welfare ("HEW") in 45 C.F.R., Section 206.10(a) (Record page 131). Defendant answered denying the material allegations of the complaint.

Aid to the Aged, Blind and Disabled ("AABD") is one of the categorical programs administered by the Illinois Department of Public Aid ("IDPA") pursuant to the Illinois Public Aid Code, Ill. Rev. Stat., Ch. 23, Sections 3-1 to 3-12 (1971). The program is funded 50% by the State. The other 50% is provided by the Federal Government under the Social Security Act, 42 U.S.C., Sections 303-306; 1201-1206; 1351-1355; 1381-1385 (1971). The IDPA issued regulations pursuant to Ill. Rev. Stat. Ch. 23, Sections 12-13 (1971), and HEW, which administers AABD for the Federal Government, promulgated regulations pursuant to 42 U.S.C., Section 1302 (1971). Plaintiffs contended that the IDPA was required to process all applica-

tions for welfare assistance for the aged, blind and disabled within thirty days of the initial application. Having failed to process such applications within the specified time, so plaintiffs contended, the plaintiff class was entitled to monetary award, commencing on July 1, 1968, to be computed by the amount of money the members of the class would have received had the applications been processed within 30 days. Plaintiff also sought punitive damages in the amount of $100,000 against defendant Harold O. Swank. In subsequent Amended Complaints filed in the U.S. District Court, plaintiffs alleged that applications for benefits to the disabled had to be processed within 60 days under HEW regulations.

Defendants never claimed that all such applications were processed within 30 or 60 days. Indeed, defendants pointed out that some applications take longer to process than others because of the various factors which must be determined in order to established the eligibility of particular applicants.[1]

The District Court granted summary judgment for plaintiffs and issued a Memorandum Opinion and Order on February 4, 1972 (Record, page 321). On March 15, 1972, the District Court entered a Judgment Order (Record, pages 335-337) which provided, *inter alia,* that:

> 1.) The IDPA and the individual defendants be permanently enjoined from failing to make determinations of eligibility within 30 days of initial application for aid to the aged and blind under the Illinois AABD program, and within 60 days from the date of application as to applicants for aid to the disabled under the AABD program;

[1] Brief in Opposition to Plaintiff's Motion for Summary Judgment, page 7.

2.) Aid for those found eligible be initiated not later than the final date for eligibility determination;

3) 45 C.F.R., Section 206.10(a), be strictly complied with and any inconsistent provisions in the Illinois Categorical Assistance Manual (namely, Section 4004) be declared invalid insofar as inconsistent with that regulation.

The Court also found for the plaintiff on the monetary award question. It required defendants to make all payments not made to all applicants who had applied to the IDPA for AABD benefits between July 1, 1968 and April 16, 1972, and were subsequently determined eligible by the IDPA, as follows:

(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement became effective.

(b) (i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not mailed within forty-five days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, damages were to be paid by the State of Illinois to all eligible applicants equal to the AABD assistance they would have received

for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective. (Record, page 338.)

The Court required these AABD benefits to be mailed by the defendant to those persons currently receiving AABD within eight months with an explanatory letter, approved by Plaintiffs' attorney.

For those persons not presently receiving AABD from the IDPA, the Court required this action:

(a) A certified letter (return receipt requested), approved by plaintiffs' attorney, must be sent to the last known address of any person who is eligible under the program for damage payments set out above, informing him that he is entitled to a specified amount of AABD benefits wrongfully withheld. That person may claim the amount, computed under the damage formula, by contacting the appropriate County Department of Public Aid within 45 days from the receipt of said letter.

(b) If the appropriate County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. The Court also declared that persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision. (Record 339.)[2]

An appeal then followed to the Court of Appeals. It was based on substantially the same grounds as are raised in this petition for writ of certiorari; in particular, it was

[2] The District Judge stayed the retroactive payments portion of his decree pending appeal to this Court.

pointed out that an action for a monetary award filed against state officials in their official capacity, the award to be discharged out of the Illinois General Revenue Fund, could not be maintained in the federal district court in view of the provisions of the Eleventh Amendment to the United States Constitution. The Seventh Circuit Court of Appeals rejected that contention, and found that a retroactive monetary award given to welfare recipients did not contravene the prohibitions of the Eleventh Amendment to the United States Constitution.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND DECISIONS OF THIS HONORABLE COURT WITH RESPECT TO THE PROPER APPLICATION OF THE ELEVENTH AMENDMENT.

The issues in this appeal are identical to those presented in *Rothstein* v. *Wyman*, 467 F.2d 226 (CA 2, 1972), cert. denied, 41 Law Week 3527 (Docket No. 72-5831), and *Like* v. *Carter*, 41 Law Week 2406 (DC Mo., 1973).

The disposition of the question raised in this petition is of crucial importance to the State of Illinois since the State must be in the financial position to match its expectant costs of administering state government against its anticipated revenue. The financing of state government, for example in Illinois, is unlike that of the Federal Government. States are unable to finance budgetary deficits with either the application of monetary controls or the ability of a federal reserve open market committee to use treasury bills and notes to raise required sums of money for additional financial outlays. The state's ability to borrow is severely restricted by statutes. Hence, a state must rely upon its ability to project and raise revenue under various revenue raising schemes, limited though as they are, such as state income taxes, retailers occupation taxes, use taxes and other sundry revenue measures; the state's cash outgo must be conscientiously controlled by strict adherence to budgetary processes. The reason for that strict control lies in the limited financial resources available to local and state government.

The question whether a federal district court may entertain jurisdiction over a claim for retroactive welfare benefits purported to be wrongfully withheld has substantial

impact upon the ability of local government to function and meet its responsibilities under its various statutory obligations.

Historically, the Eleventh Amendment has been held a bar to an action in the U.S. District which sought to obtain state governmental funds or property. In such instances, this Honorable Court has held that such an action is barred by the Doctrine of Sovereign Immunity embodied in the Eleventh Amendment.

In the following cases, this Court has emphasized that, even if unconstitutional conduct was involved, a request for affirmative relief, though nominally directed against an officer of the state, was precluded because of the state's immunity from suit. For example, in *Louisiana* v. *Jumel,* 107 U.S. 711 (1883), where the plaintiffs had instituted actions to compel state officials to levy and collect certain taxes in order to carry out the state's obligations under bonds issued by the state, it was held that the action could not be maintained because of the state's immunity from suit. It was said that the remedy sought, to be complete, would require the Court to assume the executive authority of the state, insofar as it related to the enforcement of the law requiring collection of additional taxes. See also *Hagood* v. *Southern,* 117 U.S. 52 (1886); *North Carolina* v. *Temple,* 134 U.S. 22 (1890); *Louisiana ex rel. New York Guarantee and Indemnity Company* v. *Steele,* 134 U.S. 230 (1890); and dicta in *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U.S. 682 (1949).

In still another large number of cases it has been emphasized that even if an officer's conduct is unconstitutional, the action against the officer is barred by the doctrine of governmental immunity if the purpose of the

action is to obtain government funds or to obtain property which is in the government's possession, or to control the disposition of property in the government's possession.

For example, in *Murray* v. *Wilson Distilling Company*, 213 U.S. 151 (1909), the plaintiff sought to enjoin members of the state's Liquor Dispensary Commission from disposing of funds without paying the plaintiff's claim for liquor purchased by the Commission. Although the plaintiff claimed that the Commission's funds constituted a trust fund for the benefit of those who had claims against the Commission, this Court rejected that contention and held that the funds belonged to the state, thus making an action involving the funds one against the state, prohibited by the doctrine of Sovereign Immunity embodied in the Eleventh Amendment. See also the holdings in *Louisiana* v. *Jumel, supra; Hagood* v. *Southern*, supra; *Naganab* v. *Hitchcock*, 202 U.S. 473 (1906); *Carolina Glass Company* v. *South Carolina*, 240 U.S. 305 (1916); *Great Northern Life Insurance Company* v. *Reed*, 322 U.S. 47 (1944); *Ford Motor Company* v. *Department of Treasury*, 323 U.S. 459 (1944); and *Mine Safety Appliance Company* v. *Forestal*, 326 U.S. 371 (1945).

Additionally, the Eleventh Amendment has been held a bar to suits for monetary awards to compensate for personal injuries or property damages under a federal statute. *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 186 (1964) (suit for damages for personal injury under the FELA); *Ex parte New York* 256 U.S. 490 (1921) (an admiralty suit for property damages due to negligence). Such cases exemplify the firmly rooted tradition that consent is required to impress treasury liability for a tort. The whole area is extremely sensitive because liability is imprecise in amount, and could lead to great fiscal disruption of

the body politic. See Jaffee, *Suits Against Government and Officers: Sovereign Immunity;* 77 Harv. Law Rev. 1-29 (1963).

It is respectfully submitted that the judgment of the District Court and the Seventh Circuit Court is in direct contravention of the decisions of this Court and the recent decision of the Second Circuit Court of Appeals in *Rothstein* v. *Wyman* (2nd Cir. 1972), 467 F.2d 226.

An action against the Director of the Illinois Department of Public Aid for welfare benefits purportedly wrongfully withheld, is barred by the doctrine of sovereign immunity. While the language of the XIth Amendment bars only suits by citizens of one state against another state, a long line of decisions of this Court consistently held that a suit by the citizen of a state against his own state, absent the consent of the state, is equally not maintainable. See *e.g., Parden* v. *Terminal R. of Alabama Dock Department,* 377 U.S. 184, 186 (1964), and cases cited therein. See also *United States* v. *Mississippi,* 380 U.S. 128, 140 (1965). A state is not divested of its immunity merely because the case is one arising under the Constitution or laws of the United States. *Hans* v. *Louisiana,* 134 U.S. 1, 10 (1890). See also *Ex parte New York,* 256 U.S. 490 (1921); *Duhne* v. *New Jersey,* 251 U.S. 311 (1920); *Smith* v. *Reeves* 178 U.S. 436 (1900)

Rothstein v. *Wyman* (2nd Cir. 1972), 467 F.2d 226, dealt with the same subject matter as is involved here. Yet, contrary to the decision of the Seventh Circuit Court in this case, the Second Circuit Court in *Rothstein* held that the Eleventh Amendment barred an action in the U.S. District Court for the release of benefits, supposedly wrongfully withheld. The Court said (467 F.2d 226 at 236):

Wholly apart from what we have found to be an improper exercise of equity jurisdiction by the District Court in ordering retroactive payments, there is a very serious question as to whether such jurisdiction exists at all. The Eleventh Amendment provides that the federal judicial power does not extend to suits against a state, and appellants press strongly upon us the proposition that, insofar as retroactive payments are concerned, this is in truth a suit against the State of New York to which it has never consented. We conclude that this point is well taken.

• • •

It is not pretended that these payments are to come from the personal resources of appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. It is equally a part of the lore of the Eleventh Amendment that, even though a state may not be named as a party defendant, any judgment declaring a liability which must be met from the public funds of the state does come within the reach of the Eleventh Amendment; and a court will, absent the state's consent, be deemed without jurisdiction to enter such a judgment. *Ford Motor Company* v. *Department of Treasury of Indiana*, 323 U.S. 459, 463-464, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.

What all this suggests is that the Supreme Court has not yet come to grips with the problem of retroactive public assistance payments as a remedy which federal courts either can or should order to be made.

What is clear is that declaratory and injunctive relief can be granted against state officials which prohibit the continued enforcement of state welfare statutes or in keeping with standards deriving from federal statutes. An unconstitutional state practice or plan could not be continued by the state even if it were willing to forego federal financial help, although even in such case the existence of federal jurisdiction to require retroactive payments would be dubious at best—a situation which, of course, we do not have here. Contrarily, state welfare administration which is invalid only in the sense that it does not conform to federal standards may be continued, federal court injunction notwithstanding, if the state is willing to bear its entire cost.

In the light of these propositions—which are about the only certainties we discern in this complex and confused area of the law—we believe ourselves, insofar as the Supreme Court is concerned, to be free to assert that, first, we not consider it an appropriate exercise of federal equity jurisdiction for the District Court to compel New York to devote its funds to retroactive payments, and, second, even if the action taken by the District Court be deemed to be in keeping with the framework of federal-state relationships in the case of grants-in-aid for the welfare programs, the Eleventh Amendment stands in the way.

In *Rothstein* the Court additionally found it an inappropriate exercise of federal equity jurisdiction to order the retroactive payment of public assistance benefits in view of the statutory scheme embodying the concept of cooperative federalism. With respect to that issue, the New York welfare agency contended that retroactive payments would go to persons no longer on welfare rolls, hence preventing already inadequate state funds from being channeled to persons whose needs were immediate and urgent. Particularly, the special incremental value

of money to persons living at subsistence levels was noted, but, at the same time, it was observed that it was not certain that persons from whom funds were withheld in 1969 had a present compelling need for them, or that it was provident, giving existing deprivations that might be relieved, to order the expenditure of scarce funds as compensation for past suffering, which, however deplorable, could not be undone.

The inappropriateness of retroactive payments, however, was based on federal policy established in Congressional welfare legislation. The court observed that the only remedy provided by Congress for statutory and regulatory violations and, as a consequence, for protecting the federal treasury was a prospective cut-off of funds. Congress clearly was sensitive to the potential for serious strain on the federal structure inherent in a grant program of great magnitude and complexity. The Court, therefore, declared that states, through the incentive of matching grants, were to be encouraged to make generous use of their funds to aid their impoverished citizens; however, they were not to be deprived of their freedom to ultimately determine whether, and how, state funds were to be spent. Absent explicit directions from Congress to the contrary, it was not thought that federal interest in retroactively correcting the misuse of federal funds—the only federal policy applicable to this case could by itself justify the significant increase in state tensions that would result inevitably from a court order requiring the state to expend its funds against its will. It was further noted that there was no bad faith on the part of the State.

It is respectfully submitted that the Second Circuit Court was correct in its conclusion that the cut-off of federal funds is the only remedy provided in the Social Security Administration Act to welfare recipients. Clearly, Con-

gress never permitted nor did it intend the requirement of retroactive assistance to be a remedy for noncompliance with the Social Security Administration Act. This fact is also borne out by this Court's decision in *Rosado* v. *Wyman*, 397 U.S. 397 (1970). In that case, this Court stated (397 U.S. 397 at 421-2)

> . . . we remand the case to the District Court to fix a date that will afford New York an opportunity to revise its program in accordance with the requirements of § 402(a)(23) if the State wishes to do so.
>
> • • •
>
> . . . or, should New York choose not to submit a revamped program by the determined dote, issue its order restraining the further use of federal monies pursuant to the present statute.

The United States District for the Southern District of New York on remand in *Rosado, supra,* interpreted that decision as precluding the ordering of retroactive assistance (322 F. Supp. 1173, 1195-6):

> Plaintiffs seek to invoke the equity powers of this Court to grant plaintiffs and other members of their class the amounts they would have received, over and above what they actually did receive, if the State's AFDC payment schedules had been in compliance with section 402 since July 1, 1969. Under the mandate of the Supreme Court, this Court lacks power to grant such relief.
>
> • • •
>
> Concern over the strong implications for federalism implicit in congressional decisions to encourage state administered AFDC programs undoubtedly motivated the Supreme Court to emphasize that the State was to be given a choice.
>
> Supporting this conclusion is the fact that the Supreme Court afforded the State time to revise its

program before the district court was empowered to consider a restraint on the further use of federal money in the State AFDC program. *Rosado* v. *Wyman*, (397 U.S. 397, 421-422, 90 S. Ct. 1207, 1222, 25 L.Ed. 2d 442, 1970). If a remedy for underpayments had, in a sense, vested, this limitation on the district court's power would have been inappropriate.

The denial of a substantial retroactive money award in *Rosado* was not appealed by plaintiff.

The denial of certiorari in *Rothstein* v. *Wyman*, Case No. 72-5831, and this Court's opinion in *Rosado* v. *Wyman*, *supra*, give strong support to the conclusion that there are both constitutional and federal statutory bars to retroactive money awards being granted to welfare recipients.

However, both the Seventh Circuit Court of Appeals and the respondent characterize the payment of retroactive awards as equitable restitution so as to escape the consequences of the Federal preclusions. It is submitted that the characterization of monetary awards as equitable restitution is improper. It is an elementary principle of equity jurisprudence that the court will look to the substance of a particular transaction as opposed to its form in determining its consequences. *Young* v. *Higbee*, 324 U.S. 204 (1944); *Bromley* v. *McCaughn*, 280 U.S. 124 (1929). In this respect, the true nature of a retroactive money award against the state will not be changed by pinning on it the label of equitable restitution. Basic doctrines of constitutional law cannot be avoided by so easy a device.

It was urged, nevertheless, by the respondents that their right to relief is based on a federal cause of action. The petitioners demonstrated that this federal cause of action cannot be statutory in nature since there is no such remedy as "retroactive assistance" provided in the Social

Security Act. Hence, the theory of equitable restitution must find its basis upon an alleged federal common law cause of action. However, plaintiffs do not fulfill the conditions precedent for the application of equitable restitution, even under the common law. The establishment of unjust enrichment is an indispensable prerequisite for a claimant to entitle him to equitable restitution. See *Rankin* v. *Emigh*, 218 U.S. 27, 54 L.Ed. 915 at 1921 (1910). See also, Restatement of Restitution, Sections 1, 3, 107, and Comment B.

It is respectfully submitted that, as a matter of law, there has been no unjust enrichment of the Illinois Department of Public Aid, the body politic, or the taxpayers of the State of Illinois under the facts and circumstances involved in this case. In each of the past several years, the Illinois General Assembly has been asked to enact an emergency deficit appropriation to meet the needs of welfare recipients under the Categorical Assistance Programs. Accordingly, every dollar appropriated has been paid to the class of welfare recipients now before this Court. The body politic has not retained an extra dollar of the AFDC appropriation; it has not turned back any funds to the Illinois General Assembly; and the taxpayers have not had any of their taxes reduced thereby.

If there is to be an unjust enrichment as a result of the facts and circumstances of this appeal, it is the welfare recipients themselves who will be unjustly enriched. It is undisputed that some of the members of the class of welfare recipients now before this Court are no longer on welfare, and hence, do not qualify for assistance today. Nevertheless they will receive assistance today should they prevail in this case.

Hence, the doctrine of equitable restitution has no application to the present facts and circumstances, and, there-

fore, the relief sought by the plaintiffs is substantively a retroactive money award dischargeable from the General Revenue Fund of the State.

UNDER STANDARDS ENUNCIATED BY THIS COURT FOR DETERMINING THE EFFECT TO BE GIVEN A JUDGMENT, THE FACTS IN THE INSTANT CASE MANDATE PROSPECTIVE APPLICATION ONLY.

This Court has established that the Federal Constitution neither precludes nor compels the prospective application of a court's decision in either a civil or a criminal case. *Chevron Oil Co.* v. *Hudson*, 404 U.S. 97, 30 L.ed. 2d 296, 92 S.Ct. 349 (1971); *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Great Northern Railway* v. *Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). Until recently courts had been given unfettered discretion in deciding what standards should govern prospective application, and as a result have arrived at varied conclusions. Compare, e.g., *United States* v. *Scotts*, 425 F.2d 55 (9th Cir. 1970) with *United States* v. *Scardino*, 414 F.2d 925 (5th Cir. 1969), and *Bryson* v. *Burson*, 308 F. Supp. 1170 (N.D. Ga. 1969) with *Machado* v. *Hackney*, 299 F. Supp. 644 (W.D. Tex. 1969).

This Court, however, has established certain standards for determining whether new rulings should be applied prospectively or retroactively. In *Linkletter* v. *Walker*, 381 U.S. 618 at 627, it was said that "we must look to the purpose of the [new] rule; the reliance placed on the [overruled] doctrine; and the effect on the administration of justice of a retrospective application of [the new rule] . . ." This Court also stated that no distinction is to be drawn between civil and criminal cases when determining retroactivity. 381 U.S. at 627. In *Chevron Oil Co.* v.

Hudson, 404 U.S. 97 at 106, 107, 30 L.ed. 2d 296 at 306, 92 S.Ct. 349 at 352, this Court reaffirmed the three-part *Linkletter* test in the civil area:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery Corp., supra, at 496, 20 L.Ed. 2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra, at 572, 22 L.Ed. 2d at 20. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Linkletter v. Walker, supra, at 629, 14 L.Ed. 2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for "[W]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity". Cipriano v. City of Houma, supra, at 706, 23 L.Ed. 2d at 652.

This Court most recently applied these standards in *Lemon* v. *Kurtzman*, 41 Lw. Wk. 4467 (Doc. No. 71-1470, decided April 3, 1973) (hereafter for convenience sake referred to as Lemon II). In *Lemon II* the Court held that an unconstitutional statute is not absolutely void, but is a practical reality upon which parties may rely, and that courts recognize this reality.

Indeed, an analogy can be drawn between the facts of the *Lemon* case and the present case. In *Lemon* a statute was found to be unconstitutional on its face. In this case,

the plaintiff alleged that certain Illinois Department of Public Aid regulations were not in conformity with corresponding grant in AFD regulations of the United States Department of Health, Education and Welfare, and hence contravened the Supremacy of the Laws Clause of the United States Constitution.

In *Lemon* this Court had held on June 20, 1971, that the Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. Thereafter, the case was remanded to the Three-Judge District Court for further proceedings consistent with the Court's opinion in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (Hereinafter referred to as Lemon I) On remand, the District Court entered summary judgment in favor of the appellants and enjoined payment of any state funds to non-public sectarian schools for educational services performed after June 28, 1971. The District Court's order, however, permitted the State to reimburse nonpublic schools for services provided before the Supreme Court's decisions in *Lemmon I*.

In finding that the parochial schools had a right to rely upon the unconstitutional statute, Chief Justice Burger in *Lemon II* declared:

> It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy. *City of Phoenix* v. *Kolodziejski*, supra; *Cipriano* v. *City of Houma; Allen* v. *Board of Elections, supra*. . . . (41 L.W. 4471)
>
> • • •
>
> It is argued, though, that the schools were foolhardy to rely on any reimbursement by the state whatever, in view of the constitutional cloud over the Pennsylvania program from the outset. We conclude, however, that our holding in Lemon "decid[ed] an issue of first impression whose resolution was not clearly

foreshadowed." *Chevron Oil Company* v. *Huson*, supra, 404 U.S. at 106. A Three-Judge District Court, with one dissent, upheld Act 109. Soon after, another Three-Judge District Court in Rhode Island held unconstitutional the Rhode Island statutory scheme we considered together with Pennsylvania's program in "Lemon I." Nor were the District Courts alone in disagreement over the constitutionality of Lemon-style plans to provide financial assistance to sectarian schools. This court was itself divided when the issue was ultimately resolved after full briefing and argument. And the court acknowledged, "that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." "Lemon I," supra, 403 U.S. at 612.

That there would be a constitutional attack on Act 109 was plain from the outset. But this is not a case where it could be said that Appellees acted in bad faith or that they relied on a plainly unlawful statute. In this case, even the clarity of hindsight is not persuasive that the constitutional resolution of "Lemon I" could be predicted with assurance sufficient to undermine Appellees' reliance on Act. 109.

In the end, then, Appellants' position comes down to this: That any reliance whatever by the schools was unjustified because Act 109 was "an untested" state statute whose validity had never been authoritatively determined. The short answer to this argument is that government must act if they are to fulfill their high responsibilities.

This petition for writ of certiorari is not unlike the *Lemon* case regarding retroactive application of a decision. The District Court found that the Illinois Department of Public Aid's regulations did not fulfill the conditions and requirements of the Social Security Act. At the time of the law suit the decision of the District Court was not clearly foreshadowed. Unless there can be a showing

made that the Illinois Department of Public Aid acted in bad faith, the District Court and the Seventh Circuit Court of Appeals erred in ordering a retroactive money award.

FEDERAL REGULATIONS RELIED UPON BY PLAINTIFF ARE INCONSISTENT WITH THE APPLICABLE PROVISIONS OF THE SOCIAL SECURITY ACT AND ARE THEREFORE INVALID.

Plaintiff relies upon the requirements set forth in the Federal Handbook of Public Assistance Administration, Part IV, which provides in pertinent parts as follows:

> 2200 Requirements for State Plans. A State Plan for OAA, AFDC, AB, APTD, or AABD must provide that:
>
> (3) Prompt action will be taken on each application within reasonable state established time standards (which effective July 1, 1968, will not exceed 30 days).

In February of this year 45 C.F.R. Section 206.10 was promulgated, which provides:

> (a) *State Plan Requirements.* A State Plan under Title, I, IV-A, X, XIV, or XIX of the Social Security Act must provides that
>
> • • •
>
> (3) A decision will be made promptly on applications, pursuant to reasonable state-established time standards not in excess of 30 days of OAA, AFDC, and AB (and in AABD and MA as to the aged and blind) and 60 days in APTD (and AABD and MA as to the disabled).
>
> • • •
>
> (5) Financial assistance and medical care and services included in the plan will be furnished promptly to eligible individuals without delay attributable to the agency's administrative process, and will be continued regularly to all eligible individuals until they are found to be ineligible.
>
> • • •

(6) Entitlement will begin as specified in the State plan, which (i) for financial assistance must be no later than the date of authorization of payment and, for purposes of Federal financial participation, may be as early as the first of the month in which an application has been received and the individual meets all the eligibility conditions.

The Social Security Act, 42 U.S.C. Sections 302 (a)(4), 602 (a)(4), 1202 (a)(4), 1352(a)(4), 1382(a)(4), provides only for a hearing to any individual where a claim is not acted upon "with reasonable promptness". The establishment of arbitrary thirty and sixty day maximums in the HEW regulations for determination of eligibility and initiation of payments without taking into consideration the efficient administration of the Act by the State agencies is inconsistent with the "reasonable promptness" requirement and must therefore be declared unlawful as being an abuse of the rule-making authority granted to the Secretary of HEW under Section 1302 of the Social Security Act.[3]

This Court has expressed the governing principle for rules which attempt to extend or modify a statute. "If experience shows that Congress acted under a mistaken impression, that does not authorize the . . . Department . . . to make new laws which they imagined Congress would have made had it been properly informed." *Merritt* v. *Welsh*, 104 U.S. 694, 704 (1882). In a Second

[3] 42 U.S.C. Section 1302 reads as follows:

"The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education and Welfare, respectively, shall make and publish such rules and regulations, *not inconsistent with this Chapter*, as may be necessary to the efficient administration of the function with which each is charged under this chapter."

Circuit case, the standard for testing the validity of an HEW regulation specifically was said to be whether the regulation was "unreasonable" and "contrary to the act." *Connecticut State Department of Public Welfare* v. *Department of HEW*, 448 F.2d 209, 213 (2nd Cir. 1971). See also *Bingham's Trust* v. *Commissioner of Internal Revenue*, 325 U.S. 365 (1945); *Campbell* v. *Galeno Chemical Co.*, 281 U.S. 599 (1930); *Waite* v. *Macy*, 246 U.S. 606, 608 (1918); *Almenares* v. *Wyman*, 344 F. Supp. 512 (S.D. N.Y. 1971).

A Wisconsin state court decision offers an analogy to the case at hand. In *Wisconsin Bridge and Iron Co.* v. *Industrial Commission*, 268 Wis. 314, 67 N.W. 2d 378 (1954), the Supreme Court of Wisconsin considered a statute which provided that an employer should furnish and use safety devices and safeguards "reasonably adequate to render such employment and places of employment safe." 67 N.W. 2d at 379. A rule of the Industrial Commission placed an absolute duty on employers to prohibit employees from working on any slippery platform until it had been sprinkled with sand or otherwise made non-slippery. The rule contained no "reasonableness" provision; nor was there any reference to the nature of the work or the place of the employment as considerations in rendering floor surfaces non-slippery. The rule was therefore declared "invalid as imposing upon an employer a greater duty than was imposed by statute to provide a place of employment as free from danger to his employees as the nature of the employment and the place of employment would reasonably permit." Id. at 380.

Application of this principle to the case at hand is apparent. Here, the Secretary has imposed requirements

far beyond those required by statute. The Social Security Act requires only that the hearing be held if an application is not acted upon with "reasonable promptness". The regulations, however, set 30 and 60-day limits for final determination of eligibility and initiation of payments. Such a requirement greatly extends the intent of Congress and goes far beyond the permissible scope of the statute.

There exists no legislative history explaining what Congress meant by the term "reasonable promptness." Nor has the phrase been defined by the court specifically with respect to the Social Security Act, although a number of cases have dealt with similar statutory requirements. Thus, the term "prompt" has been construed to mean acting with proper diligence or within a reasonable time. *Bowles* v. *Mutual Benefit Health & Accident Association,* 99 F. 2d 44 (4th Cir. 1938); *Chapman* v. *Telex, Inc.,* 129 F.Supp. 567 (N.D. Ga. 1954). The party involved should proceed with that speed which the nature of the case and the surrounding circumstances require. *Jordy* v. *Dunliere,* 77 S.E. 162 (Ga. 1913).

One District Court did deal with Section 602 of the Social Security Act prior to the passage of the regulation in question. In *Cooper* v. *Laupheimer,* 316 F. Supp. 264 (E.D. Pa. 1970), the court simply held that by accepting federal funds a state assumes a duty that aid shall be furnished with reasonable promptness to all eligible individuals.

Imposition of rigid 30 and 60-day requirements under the guide of the "reasonable promptness" rubric for a final determination as to welfare eligibility and the initiation of welfare payments is arbitrary and unreasonable and must therefore be struck down. See, e.g.,

Illinois Steel Co. v. *Baltimore & Ohio R.R. Co.*, 320 U.S. 508 (1944); *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129 (1936).

To be sure, the views of agencies entrusted with the administration of a statute are to be given due deference when issues of statutory interpretation arise. See generally, Annot., *Administrative or Practical Construction of Statute as Precedent for Judicial Construction*, 84 L.Ed. 28 (1939). Nevertheless, the attitudes, practices and interpretations of an administrative agency are certainly not absolute rules of law but, at best, merely "helpful guides to aid courts in their task of statutory construction." *Sims* v. *United States*, 252 F.2d 434, 438 (4th Cir. 1958), aff'd 359 U.S. 108 (1959). The ultimate authorities on issues of statutory interpretations are the courts (*Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968)), which have the final responsibility to declare what a statute means (*Fishgold* v. *Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 790 (2nd Cir.) (L. Hand. J.), aff'd. 328 U.S. 275 (1946)). To the same effect, see e.g., *Folsom* v. *Pearsall*, 245 F. 2d 562, 564-565 (9th Cir. 1957); *Commissioner of Internal Revenue* v. *Winslow*, 113 F. 2d 418, 423 (1st Cir. 1940). Where a conflict arises between the administrative and judicial construction of a statute, the latter will necessarily prevail. *Deeg* v. *Lumbermen's Mut. Cas. Co.*, 279 F. 2d 491, 494 (10th Cir. 1960); *Woods* v. *Benson Hotel Corp.*, 177 F. 2d 543, 546 (8th Cir. 1949); *Williams* v. *Dandridge*, 297 F. Supp. 450, 460-462 (D.Md. 1968), rev'd on other grounds, 397 U.S. 451 (1970), and cases cited therein. See K. Davis, *Administrative Law Treatise, Section* 5.06, pp. 326-328 (1958). In determining the proper weight to be accorded to an administrative decision, account must be taken of the consistency of the agency's interpretation with the underlying purposes of

the statute which is being construed. *P. Lorillard Co.* v. *FTC,* 267 F. 2d 439, 443 (3rd Cir.), cert. den., 361 U.S. 923 (1959). In no event is a court "compelled to follow an administrative interpretation that it regards as inconsistent with the legislative purpose of the provision in issue." *In re Petition of Chin Thloot Har Wong,* 224 F. Supp. 155, 165 (S.D. N.Y. 1963). If the agency's construction has resulted from an uncontested nonadversary proceeding, it has been said that the agency's interpretation is entitled to "relatively little weight." *SEC* v. *Sterling Precision Corp.,* 393 F. 2d 214, 220 (2nd Cir. 1968). See, *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 290 (1946). Nor is an administrative agency permitted, in effect, to amend a congressional statute by imposing requirements, such as HEW has attempted to do with its 30 and 60-day rules, which are not authorized by the statute conferring rule-making power on the agency. See, e.g., *State of Arizona* v. *Richardson,* No. CIV 71-563 (D. Ariz., June 16, 1972).

The number of people receiving welfare benefits in the State of Illinois has grown from 424,665 in February 1967 to approximately 983,600 at the present time. In 1971 397,298 new recipients were added to the welfare rolls. The time required to place these individuals on the welfare lists renders a thirty-day requirement unreasonable. Congress recognized the burden of administering the welfare program when it merely required that benefits be commenced with "reasonable promptness." The State of Illinois attempts to meet that standard; a thirty-day requirement, however, is admintstratively unreasonable and therefore operates in derogation of the Social Security Act.

The annual cost of welfare in Illinois for the fiscal year 1972 was $1,018,078,753. Placing a thirty-day requirement

on determination of eligibility will hamper effective investigation of potential applicants and will increase the number of fraudulent claimants eventually receiving benefits. The cost to the State and to the Federal government is potentially very high.

Defendant, therefore, respectfully submits that the rigid thirty-day and sixty-day time limits of the HEW regulations for final determination for eligibility for welfare benefits are administratively unreasonable, unsound, and arbitrary, are inconsistent with the provisions of the Social Security Act which simply require "reasonable promptness" in making such determinations, and should consequently be declared unlawful as an unauthorized exercise of HEW's rule-making authority.

CONCLUSION

For all these reasons, it is respectfully asked that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

Nos. 72-1380, 72-1381

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similarly situated,
Plaintiffs-Appellants, Cross-Appellees,

v.

EDWARD T. WEAVER, *et al.*,
Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 C 70

ALEXANDER J. NAPOLI, *Judge.*

ARGUED OCTOBER 20, 1972 — DECIDED JANUARY 18, 1973

Before HASTINGS, *Senior Circuit Judge,* CUMMINGS, *Circuit Judge,* and GORDON, *District Judge.*[1]

CUMMINGS, *Circuit Judge.* This class suit was brought to challenge actions of Illinois and Cook County officials in administering the federal-state program of Aid to the Aged, Blind and Disabled ("AABD") under 42 U.S.C. §§ 1381-1385. Count I of the amended complaint alleged that defendants, acting pursuant to Section 4004.1 of the Categorical Assistance Manual of the Illinois Department

[1] District Judge Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

of Public Aid,[2] were not complying with federal regulations requiring that eligibility determinations on applications for assistance for the aged and blind under AABD be made within 30 days and for the disabled within 60 days (formerly 45 days) and requiring that those found eligible receive their assistance within the respective maximum time periods.[3] Plaintiffs further charged that defendants improperly authorized grants to commence only with the month in which an application was approved and not including prior eligibility months for which an applicant was entitled to aid under federal law.[4] Count II alleged that the Fourteenth Amendment, the applicable federal and Illinois statutes, and the federal regulations

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[2] That Section provides in pertinent part:
"Except for DA and MA-NG(D) cases which have a time standard of 45 days, the time standard for disposition of applications is 30 days *from the date the applicants are determined eligible and the effective date of their first assistance* or are determined ineligible and receive a notice of denial of assistance * * *." (Emphasis supplied.)

[3] See 45 C.F.R. § 206.10(3), which provides in pertinent part:
"A decision will be made promptly on applications, pursuant to reasonable State-established time standards not in excess of 30 days for OAA, AFDC, and AB (and in AABD and MA as to the aged and blind) and 60 days in APTD (and in AABD and MA as to the disabled). Under this requirement the applicant is informed of the agency's time standard in acting on applications, *which covers the time from date of application to the date that the assistance check*, or notification of denial of assistance or change of award, or the eligibility decision with respect to medical assistance, *is mailed to the applicant or recipient*." (Emphasis supplied.)
and 45 C.F.R. § 206.10(6), which provides, *inter alia*:
"Entitlement will begin as specified in the State plan, which (i) for financial assistance must be no later than the date of authorization of payment * * *."
The longer time period for the disabled is to permit a medical determination of their disability.

[4] 42 U.S.C. § 1382(a)(8); 45 C.F.R. § 206.10(3) and (6).
At all times pertinent to this case, Section 8255.1 of the Categorical Assistance Manual of the Illinois Department of Public Aid provided that a new assistance grant may be authorized for the month in which the application was approved but not (with certain exceptions) for any prior period. Thus where eligibility was determined subsequent to the 30-day and 60-day time periods mandated by federal regulations, an applicant might not receive assistance retroactive to the 30th or 60th day. Such was the case of the named plaintiff who applied for disability assistance on September 18, 1970, but who received aid starting only with the month of January since that was the month in which his application was approved. See *Rodriquez v. Swank*, 318 F.Supp. 289, 292-293 (N.D. Ill. 1970), affirmed, 403 U.S. 901. A new Illinois Department of Public Aid regulation, Section 8111 of the Categorical Assistance Manual, provides that when a determination of eligibility is not made within the 30-day or 60-day periods "assistance is to be retroactive

require that AABD applicants who meet the eligibility conditions on the date of application must receive assistance effective from that date.

The district court declared Section 4004 (and subsections thereunder) of the Illinois Categorical Assistance Manual invalid insofar as it was at variance with 42 C.F.R. § 206.10(3) and granted a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants, except in certain exemplified unusual circumstances, and retroactively requiring defendants to release AABD benefits withheld from those whose applications, commencing on July 1, 1968, to April 16, 1971,[5] had not been processed within the federal time limits. A stay pending appeal was granted as to the latter requirement. The court also held that eligible AABD applicants are not entitled to assistance from the date of application and denied plaintiff's prayer for punitive damages against a former Director of the Illinois Department of Public Aid. Defendants appeal from the district court's decision on the grounds that plaintiff's suit for retroactive welfare benefits may not be maintained in federal court because barred by the Eleventh Amendment, that the judgment of inconsistency between the federal regulations and the provisions of the Illinois Categorical Assistance Manual can be given prospective effect only, and that the federal regulations in question are inconsistent with the Social Security Act. Plaintiffs appeal from that decision insofar as it held them not entitled to receive benefits from the date of their

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[4] (Continued)
to the 30th or 60th day from the date of application, providing the applicant was eligible for that period." However, whereas Section 8255.1 made assistance effective from the first of the month in which eligibility was determined, Section 8111 provides "[T]he period for which needs may be met by initial authorization begins with the date of decision and authorization action by the caseworker." Hence in a case in which the caseworker acts within the appropriate deadline, Section 8111 may defer the effective date of initial assistance beyond what Section 8255.1 would have provided. But see 45 C.F.R. § 206.10(6).

[5] July 1, 1968, is the effective date of the federal regulations prescribing maximum permissible time standards for processing AABD applications, and April 16, 1971, is the date of the preliminary injunction herein. Under the judgment below, benefits were to be released retroactive to the appropriate time limits.

applications and insofar as it failed to award the requested punitive damages.

Eleventh Amendment Defense

Defendants' principal argument is that the Eleventh Amendment or the sovereign immunity doctrine bars an action against the Director of the Illinois Department of Public Aid for retroactive welfare AABD payments. Significantly, defendants do not rely on the Eleventh Amendment or sovereign immunity with respect to the expenditure of state funds resulting from other portions of the judgment below. We conclude the argument must fail.

First of all, in four different three-judge court decisions which rejected the identical Eleventh Amendment argument defendants advance here, appeals were taken to the Supreme Court specifically raising the point. The Supreme Court affirmed each case. *Sterrett* v. *Mothers & Childrens Rights Organization*, ... U.S. ....., 41 U.S.L.W. 3182 (October 10, 1972), affirming unreported order and judgment, N.D. Ind. April 14, 1972, on remand from *Carpenter* v. *Sterrett*, 405 U.S. 971; *State Dep't of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918, affirming unreported decision, S.D. Fla. Sept. 29, 1971, January 20, 1972; *Wyman* v. *Bowens*, 397 U.S. 49, affirming *Gaddis* v. *Wyman*, 304 F. Supp. 717, order at CCH Pov. L. Rptr. Transfer Binder ¶ 10,506 (S.D. N.Y. 1969); *Shapiro* v. *Thompson*, 394 U.S. 618, affirming 270 F.Supp. 331 (D. Conn. 1967).[6] Although two of the affirmances

[6] In *Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), the Second Circuit did not have before it the Supreme Court's summary affirmances in *Sterrett* v. *Mothers & Childrens Rights Organizations*, *supra*, and *State Dep't of Health and Rehabilitative Services* v. *Zarate*, *supra*. The former decision came down after the September 7, 1972, decision of the Second Circuit in *Rothstein*; although the latter had already been rendered, it apparently escaped the Second Circuit's attention. The Second Circuit dismissed the *Wyman* v. *Bowens*, *supra*, affirmance on the ground that the district court's opinion, reported at 304 F.Supp. 717, "recites the court's purpose to enjoin the defendants from enforcing the state statute but says nothing about the remedy of retroactive payments to persons denied assistance prior to the invalidation of the statute." 467 F.2d at 239. However, the order entered following the opinion grants exactly such a remedy, CCH Pov. L. Rptr., Transfer Binder ¶ 10,506 at 11,402-11,403 (October 10, 1969), and the jurisdictional statement in the Supreme Court raised the issue of the propriety of such

were summary, and the other two at least the equivalent, (in *Shapiro* the Supreme Court affirmed without commenting on the issue, and *Wyman* was a per curiam affirmance on the authority of *Shapiro*), a summary affirmance is a decision on the merits having precedential value. *E.g.*, *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *United States*, 400 U.S. 932, 935 (Justice White dissenting from the summary affirmance); *Barton* v. *Sentner*, 353 U.S. 963 (Justices Burton and Clark dissenting from the summary affirmance). See Stern and Gressman, Supreme Court Practice 197 (4th ed. 1969). Therefore, we conclude that the aforementioned Supreme Court affirmances foreclose the sovereign immunity or Eleventh Amendment argument defendants press here.

Secondly, even if an independent analysis were open to us, we would hold the defendants' contentions to be without merit. We recognize the Second Circuit came to a contrary conclusion in *Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), but are unpersuaded by its reasoning.[7]

The Eleventh Amendment reads as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

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[6] (Continued)
relief and argued such relief "was an incursion on the Eleventh Amendment." p. 18. With respect to *Shapiro*, *supra*, the Second Circuit acknowledged that the jurisdictional statement in that case raised the Eleventh Amendment issue, but somehow thought that the Supreme Court's affirmance of the district court's judgment awarding the plaintiffs monies unconstitutionally withheld was meaningless because the Supreme Court did not comment on the issue and because two other district court decisions disposed of in the same opinion did not involve that issue. 467 F.2d at 239, 239-240 n. 9. We are of the opinion that the *Shapiro* decision must be considered at least the equivalent of a summary affirmance of the district court's decision on the Eleventh Amendment point. See 270 F.Supp. at 338, n. 5.

[7] Defendants also rely on *Westberry* v. *Fisher*, 309 F.Supp. 12 (D. Me. 1970) and *Francis* v. *Davidson*, 340 F.Supp. 351 (D. Md. 1972), which adopts the holding in *Westberry*. However, *Westberry* appears to have been overruled *sub silentio* in *Stoddard* v. *Fisher*, 330 F.Supp. 586 (D. Me. 1971), insofar as it held the plaintiffs were not entitled to illegally withheld benefits.

Taken literally, this amendment does not bar suits by Illinois citizens against Illinois or its officials. However, in 1890 the Supreme Court decided that suits against a state by citizens of the same state could likewise not be maintained in federal courts. *Hans* v. *Louisiana*, 134 U.S. 1. Whether the holding amounted to a liberal extension of the amendment or a statement of the common law of sovereign immunity is unclear, although the decision was bottomed on the concept of sovereign immunity, which found constitutional embodiment in the Eleventh Amendment.[8] For our purposes it is unnecessary to decide whether the asserted defense of immunity from suit is of constitutional stature, although we recognize that a waiver of this immunity may more readily be found if it is not.[9]

It is conceded that under the doctrine of *Ex parte Young*, 209 U.S. 123, the Eleventh Amendment or sovereign immunity is no bar to a federal court's ordering state welfare officials to bring their conduct into conformity with federal law.[10] Defendants argue, however, and the Second Circuit held, that this doctrine falls short of allowing a federal court to order these officials "to use state funds to make reparation for the past." 467 F.2d at 237. It is said that "It is * * * a part of the lore of the Eleventh Amendment that, even though a state may not be named as a party defendant, any judgment declaring a liability which must be met from the public funds of the state does come within the reach of the Eleventh

[8] See generally Note, *Private Suits Against States in the Federal Courts*, 33 U. Chi. L. Rev. 331 (1966). Compare *Ex parte Young*, 209 U.S. 123, 150; *Chandler* v. *Dix*, 194 U.S. 590, 591; *Ford Motor Co.* v. *Department of Treasury of Ind.*, 323 U.S. 459, 464; *United States* v. *Mississippi*, 380 U.S. 128, 140; with *Ex parte New York*, 256 U.S. 490, 497; *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 186, 192.

[9] See Note, *supra* note 8.

[10] In *Ex parte Young*, 209 U.S. 123, 159, the Supreme Court surmounted the Eleventh Amendment objection by resorting to the fiction that when a state official seeks to enforce state law which conflicts with paramount federal law, "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." See Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435, 437 (1968). Of course, there is nothing inherent in this fiction which precludes its utilization to allow equitable relief other than an injunction against future conduct. The state official can be said to be "stripped of his official or representative character" when ordered to pay out benefits he withheld in violation of federal law.

Amendment * * *." 467 F.2d at 236. But of course the injunctions conceded to be authorized by *Ex parte Young, supra,* certainly operate as liabilities upon the state treasury. Even before *Ex parte Young* it was recognized that relief which was appropriate notwithstanding the Eleventh Amendment would to varying degrees act directly on the property of the state. *Osborn* v. *The Bank,* 22 U.S. (9 Wheat.) 738, 853. Mandatory injunctions granted on the authority of *Ex parte Young* have certainly had an impact on the state treasury by requiring the expenditure of public funds. See, *e.g., Graham* v. *Richardson,* 403 U.S. 365; *Goldberg* v. *Kelly,* 397 U.S. 254; *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218; *Jackson* v. *Ogilvie,* 426 F.2d 1333 (7th Cir.), certiorari denied, 400 U.S. 833 (1970). Here the district court's permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants reaches into the state treasury and requires the expenditure of more monies than the state was spending under the practices found unlawful. In fact, that part of the judgment requires the expenditure of more monies than the seriously disputed part of the judgment requiring the payment of wrongfully withheld benefits! Whether a liability is declared which must be met from the state's public funds is not the touchstone of the Eleventh Amendment's applicability.

It is said in *Rothstein* that *Ex parte Young* allows only "prospective" relief and it is apparently assumed that the date of the district court's decision is the crucial one for determining prospectivity. 467 F.2d 236-237. (See note 11, *infra.*) In *Ex parte Young* the Minnesota legislature had set allegedly confiscatory railroad rates, and in an effort to make a test of the legality of the rates impracticable made issuance of any ticket above the rate a crime punishable by an enormous fine or lengthy imprisonment or both. This scheme was alleged to violate equal protection and due process. On the eve of the effective date of the legislation, petitioners applied for and received a federal court injunction against the state Attorney General forbidding him to enforce the statute. The Supreme Court held the district court could properly grant the early injunction applied for notwithstanding

the Eleventh Amendment upon finding the enactment unconstitutional. To be sure, in the posture of *Ex parte Young*, in the district court, the injunction prayed for was completely adequate equitable relief. The validity of that injunction, which the State Attorney General disobeyed, was the issue before the Supreme Court. There is nothing in *Ex parte Young* which delimits the relief a district court can give notwithstanding the Eleventh Amendment in a case which comes before it in a different posture. In fact, it appears that the Court in *Ex parte Young* was well aware that permissible relief might take a form other than a prospective injunction, for it phrased the question before it generally as "whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution • • •" 209 U.S. at 149. Even before *Ex parte Young*, in *Osborn* v. *The Bank*, 22 U.S. (9 Wheat.) 738, the Court decreed return of monies collected pursuant to an unconstitutional Ohio tax on a federally chartered bank and did not draw any distinction between a preventive injunction and a decree of restitution "if the act be performed". *Id.* at 838, 849. The Court in *Young* did not doubt this proposition. 209 U.S. at 167. We think the teaching of *Ex parte Young* is not that a prospective injunction only may issue, but that, where appropriate to deal with defiance of federal law, a federal court's equitable intervention may take an effective form.

This conclusion is buttressed by the Supreme Court's unanimous holding in *Department of Employment* v. *United States*, 385 U.S. 355. There Colorado imposed an unemployment compensation tax on employees of the American National Red Cross. Deciding that the Red Cross as a federal instrumentality was immune from such taxation, the three-judge court enjoined enforcement of the tax statute against the Red Cross and ordered a refund of taxes already paid. Faced with an Eleventh Amendment defense, the Supreme Court upheld the district court's judgment in all respects. The Court did not differentiate between the equitable reliefs and, citing *Ex parte Young* as well as *Monaco* v. *Mississippi*, 292 U.S. 313, gave no indication that the doctrine of *Ex parte*

Young did not embrace the refund of taxes wrongfully exacted or that the refund order was possible *only* because of plaintiff's status as the United States. 385 U.S. at 358.

As in *Department of Employment* v. *United States, supra,* if the only relief that could be granted under the Eleventh Amendment here were an injunction against the continuation of illegal conduct after the date of the decree, the force of federal law could be seriously blunted. The state welfare officials could withhold benefits in violation of federal law until suit is brought and a court acts, and retain the illegal savings acquired theretofore. The price would be paid by the beneficiaries of a federal program in which the state, not incidentally, agreed to participate and whose regulations it therefore agreed to abide by. 42 U.S.C. §§ 1302, 1381 *et seq.* An eligible beneficiary who brought suit contemporaneously with the initiation of the welfare officials' illegal practices and *eo instante* secured an injunction could obtain all the benefits he was entitled to, but he would forfeit part of those benefits to the unjust enrichment of the state because he did not instantly file a complaint or because federal judicial machinery consumes time.[11]

Defendants rely most heavily on *Kennecott Copper Corp.* v. *State Tax Comm'n.,* 327 U.S. 573; *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459; and *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47, for the proposition that no decree ordering the payment of state monies can surmount the bar of the Eleventh Amendment. But those cases involved non-resident suits under state-created causes of action for a refund of state taxes allegedly assessed in violation of the Constitution. They reflect the special considerations that dictate non-interference by the federal judiciary in the enforcement of state tax laws where there is an express remedial

[11] There is no suggestion here that the plaintiffs have been dilatory in filing suit. However, this consideration goes to plaintiffs' equitable entitlement to the amounts requested, not to the court's power to grant relief.

How far back the retroactive award should reach will depend on the circumstances of each case. Here, the federal regulations were promulgated well in advance of their July 1, 1968, effective date and defendants knew that compliance was required as of that date.

procedure provided in state courts.[12] Cf. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 542 n. 6; *Perez* v. *Ledesma*, 401 U.S. 82, 126-127 (concurring opinion of Justice Brennan). We cannot accept them as enunciating the broad proposition that defendants seek to derive from them.

It is said that the Supreme Court has not extended the doctrine of *Ex parte Young* to permit the recovery of monetary "damages" against a state. It is true that the Eleventh Amendment has been held a bar to suits for damages to compensate for personal injuries or property damage under federal statute or law. *E.g., Parden* v. *Terminal R. Co.*, 377 U.S. 184 (suit for damages for personal injuries under FELA); *Ex parte New York*, 256 U.S. 490 (admiralty suit for property damage due to negligence). But such cases only exemplify the firmly rooted tradition that consent is required to impress treasury liability for a tort, a sensitive area because liabilty is imprecise in amount and may work great fiscal disruption on the state. See Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 29 (1963).

Defendants would characterize the relief awarded here as "damages" and thus seek to bring the district court's judgment within the purview of this doctrine. However, we think the remedy afforded here was that of restitution, which "differs greatly from the damages and penalties which may be awarded." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402. Plaintiffs here did not seek relief for consequential damages caused by defendant's failure

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[12] In addressing the issue of Utah's consent to federal court suit, Justice Reed may have stated the true *ratio decidendi* of the immunity question in the three cases:

> "These cases declare the rule that clear declaration of a state's consent to suit against itself in the federal court on fiscal claims is required. The reason underlying the rule, which is discussed at length in the *Reed* and *Ford* cases, is the right of a state to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances." *Kennecott Copper Corp.* v. *Tax Comm'n.*, 327 U.S. 573, 577.

In none of these cases was the doctrine of *Ex parte Young* mentioned.

to disburse their full statutory entitlement.[13] Rather, incident to the injunctive relief prayed for, they asked that exactly measured benefits retained by defendants which would have been paid out but for a violation of federal law be paid over to them. Since the State of Illinois obligated itself to follow federal law in disbursing welfare assistance, it cannot cogently complain that having to make those payments now, which federal law required it to make in the first place, will wreak fiscal disruption. In accepting the federal assistance program, the state must have calculated the cost of compliance. To the extent a decree of retroactive payments would actually disturb the state's finances and cause other programs to suffer, as a matter of equitable balancing of interests, it might well be inappropriate relief.[14] But that possibility is insufficient to preclude the ability of a federal court to order restitution.

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[13] Compare *Westberry* v. *Fisher*, 309 F.Supp. 12 (D. Me. 1970), where the plaintiffs requested both wrongfully withheld benefits and consequential damages for pecuniary and other losses sustained as a result of the challenged regulations. The court did not differentiate between the claims for relief, characterizing the prayer generally as for "damages."

[14] In determining whether to order the retroactive payment of benefits, district courts are exercising their equity powers and hence must engage in a balancing process. They should give consideration to the factors to be weighed in the balance identified by the Second Circuit in *Rothstein* v. *Wyman*, 467 F.2d 226, 232-236 (2d Cir. 1972).

In this case, the defendants did not pointedly bring out below countervailing considerations that might make the district court's relief an improper exercise of equitable discretion. Notably, in appealing the award of retroactive payments in *Rodriquez* v. *Swank*, 318 F.Supp. 289 (N.D. Ill. 1970) (order Oct. 29, 1970), affirmed 403 U.S. 901, the defendants argued unsuccessfully to the Supreme Court that in ordering retroactive payments (in that case by agreement to the date the lawsuit was filed), the district court clearly abused its discretion. (Jurisdictional Statement at 12.) That case involved defendants' violation of the same federal time regulations as in this case, but with respect to AFDC applicants. Furthermore, the district court here found that defendants "knew that substantial numbers of eligible AABD applicants were being deprived, contrary to the requirements of federal law, of their full AABD entitlements effective thirty days from the date of their application * * *." Since defendants did not thoroughly argue the equities below and do not really press the point here, we will not review the appropriateness of the award of retroactive relief. However, we note that in addition to the deterrent policies that might possibly be served by such an award on the facts of this case, this is not a case involving irretrievably misspent funds but one involving funds which were wrongfully not spent at all. Cf. *Rothstein* v. *Wyman*, *supra*.

As this Court recently made clear:

> "Restitution is clearly an equitable remedy. As Professor Moore put it:
>
> > "'In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives.'
>
> The retention of 'wages' which would have been paid but for the statutory violation * * * might well be considered 'ill-gotten gains'; ultimate payment restores the situation to that which would have existed had the statute not been violated." *Rogers* v. *Loether*, 467 F.2d 1110, 1121 (7th Cir. 1972).

Here defendants, acting under color of state law, denied eligible welfare applicants timely assistance benefits to which they were entitled by federal law. In order effectively to redress the deprivation of federal rights, the district court ordered equitable restitution of the benefits wrongfully denied. As Justice Brennan stated, concurring in *Perez* v. *Ledesma*, 401 U.S. 82, 106, "* * * [T]he basic principle that in appropriate circumstances federal courts will exercise their equity power against state officials to protect rights secured and activities authorized by paramount federal law remains firmly embedded in our jurisprudence." We think that this basic principle embraces both the injunctive and the incidental restitutionary relief awarded in this case.

Thirdly, even assuming the Eleventh Amendment or sovereign immunity doctrine stood in the way of plaintiffs' suit to recover welfare benefits wrongfully withheld, Illinois has constructively consented to such an action.

No one contests the power of Congress to condition the grant of federal welfare funds to the states on their compliance with the provisions of the federal statutes and regulations relating to the states' use of these funds in their assistance programs. And no one contests the power of Congress to condition the grant of these federal monies on the states' amenability to federal court suit by the beneficiaries of these programs to recover benefits wrongfully withheld because the states failed to comply with

federal law. The questions are whether Congress intended to impose the latter condition and whether the states may fairly be said to have consented to such suits by choosing to participate in the AABD program and receive federal funds thereunder.

In *Rosado* v. *Wyman*, 397 U.S. 397, 420, the Supreme Court decided that "the avenue of *effective judicial review* [of the compatibility of a state's welfare program with federal law was open] to those individuals most directly affected by the administration of its program." (Emphasis supplied.) Although the statutes establishing the federal assistance program do not create a cause of action for these individuals, 42 U.S.C. § 1983 supplies the cause of action against state welfare officials and its jurisdictional counterpart, 28 U.S.C. § 1343(3) vests the district courts with jurisdiction to grant redress. See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538. It is inferable from the purpose of Congressional enactment of the AABD program that effective judicial review might include the remedy of restoration of benefits withheld in violation of federal law.[15] Otherwise a state could engage in practices which would deny eligible recipients the full measure of that assistance which Congress has intended for them "at the minimal risk of a subsequent finding of unconstitutionality [or illegality] (if indeed it is challenged) which finding would come only some time later after the case had gone the judicial route and which would deny retroactive relief thus giving the state the desired effect and savings at least during the period of [their] existence." *Alexander* v. *Weaver*, 345 F.Supp. 666, 673 (N.D. Ill. 1973); see also *Alvarado* v. *Schmidt*, 317 F.Supp. 1027, 1042 (W.D. Wis. 1970). Certainly we are not to be understood as meaning that retrospective relief is always or even generally an appropriate remedy.[16] However, the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them convinces us that Congress fully meant to condition the grant

[15] The federal regulations governing the federal welfare programs contemplate court-ordered, retroactive welfare payments by expressly providing for federal financial participation in such corrective payments. 45 C.F.R. § 205.10(b)(2)(3).

[16] See note 14, *supra*.

of federal funds on the states' being susceptible to a federal court suit to obtain retrospective relief. Simply put, we think it unreasonable to presume that Congress would have intended assistance to be given to welfare recipients in conformity with federal law and at the same time deny them the possibility of gaining an effective remedy. See *Employees of Dept. of Public Health & Welfare* v. *Department of Public Health & Welfare,* 452 F.2d 820, 831 (8th Cir. 1971) (dissenting opinion), certiorari granted, 405 U.S. 1016.

By participating in the federal AABD plan, thereby agreeing to comply with federal statutes and regulations, and by receiving federal funds thereunder, Illinois surely left "the sphere that is exclusively its own and enter[ed] into activities subject to congressional regulation * * *." *Parden* v. *Terminal R. Co.,* 377 U.S. 184, 196. "Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere * * * subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law." *Id.; Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 281-282. We cannot conceive that Illinois could legitimately expect to be able to participate in the federal program, receive federal funds in consideration for its agreement to channel them, together with state funds, to beneficiaries in compliance with federal law, and then be able to violate that law and invariably retain the savings accruing through that illegality. Thus as a matter of federal law Illinois has constructively consented to this suit. See *Parden* v. *Terminal R. Co., supra*; *Briggs* v. *Sagers,* 424 F.2d 130 (10th Cir.), certiorari denied, 400 U.S. 829 (1970); see also the opinion of the four dissenting judges in *Employees of Dept. of Public Health & Welfare* v. *Department of Public Health & Welfare, supra.*

Prospective Application of District Court's Judgment

Defendants assert that under *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, the judgment below must be accorded only prospective effect. This ground was not presented to the district judge before the entry of judgment, so that it comes too late. Even if the ground had been timely presented, defendants' contention would be meritless.

In the *Chevron Oil* case, the plaintiff was injured while working on defendant's drilling rig located on the Outer Continental Shelf off the Gulf Coast of Louisiana, and three years after the date of his injury brought suit in federal court under the "Lands Act" (43 U.S.C. § 1331 *et seq.*). At the time the lawsuit was filed, firm precedent interpreted the Act to make general admiralty law, including the equitable doctrine of laches, applicable, but more than a year later, yet before trial, the Supreme Court decided *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352, holding state law and not admiralty doctrines should be applied under the Lands Act. Thus Louisiana's one-year statute of limitations for personal injury actions rather than the equitable doctrine of laches would be the applicable law, but the Supreme Court declined to apply the *Rodrigue* decision retroactively to time-bar plaintiff's suit. In so doing the Court generally adopted a three-pronged test for determining the retroactivity question. The first prong is that "the decision to be applied nonretroactively *must* establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *." 404 U.S. at 106 (emphasis supplied). Only if that test is satisfied, do we reach the second and third prongs of determining "whether retrospective operation will further or retard [the new rule's] operation" and "weigh[ing] the inequity imposed by retroactive application." *Id.* at 107.

Here defendants cannot satisfy the first test. No new principle of substantive law was enunciated by the district judge. The federal time requirements for processing applications and paying eligible AABD applicants were made effective July 1, 1968, and defendants were well aware of these mandatory maximum permissible time standards. The district court merely found defendants to be noncompliant from and after the effective date of the regulations. Insofar as the defendants might suggest that the relief awarded—payment of wrongfully withheld benefits—was a new principle of law, it should suffice to say that defendants have not shown any reliance on the absence of such a remedy, much less a legitimate reliance interest worthy of protection.

Validity of Federal Regulations

In pertinent part, the Social Security Act provides:

> "A State plan for aid to the aged, blind, or disabled, or for aid to the aged, blind, or disabled and medical assistance for the aged, must—
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> • • • • •
>
> "(i) provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals;" 42 U.S.C. § 1382(a)(8).

The Department of Health, Education & Welfare ("HEW") regulations thereunder require that decisions be made promptly on applications within 30 days for the aged and blind and 60 days for the disabled and initiation of payments to the eligible must concededly be made within the same time limits.[17] Defendants contend that these time limitations in the regulations are inconsistent with the parent statute and are therefore an unlawful abuse of rule-making authority.[18] On the contrary, these time requirements, binding on state welfare officials, are an appropriate interpretation of the Congressional mandate of "reasonable promptness." *Like* v. *Carter*, 448 F.2d 798, 802-805 (8th Cir. 1971), certiorari denied, 405 U.S. 1045; *Rodriguez* v. *Swank*, 318 F.Supp. 289, 295-296 (N.D. Ill. 1971), affirmed, 403 U.S. 901.

Effective Date for Assistance

Plaintiffs contend that AABD benefits must be paid effective from the date that an individual applies for aid if he is subsequently determined eligible and meets all of the eligibility conditions at the time of his application.[19]

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[17] See note 3, *supra*.

[18] Rule-making authority is conferred by 42 U.S.C. § 1302, which provides:

> "The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter."

[19] See note 23, *infra*.

Plaintiffs argue that this result is compelled by federal regulations, the Equal Protection Clause of the Fourteenth Amendment, and the Illinois Public Aid Code. The district court rejected plaintiffs' arguments and held that defendants must make their determinations of eligibility and mail the first assistance check (or notice of denial of assistance) within 30 days from the date of application with respect to the aged and blind, and within 60 days of the date of application with respect to the disabled,[20] but that assistance was not required to be retroactive to the date of application.

Plaintiffs rely on certain general portions of the HEW's regulations providing that "a state plan * * * shall be in operation through a system of local offices on a statewide basis in accordance with equitable standards for assistance and administration * * *" (45 C.F.R. § 205.120(a)); that "funds will be apportioned among the political subdivisions of the State on a basis consistent with equitable treatment of individuals in similar circumstances throughout the State" (45 C.F.R. § 205.130(2)); that "the eligibility conditions imposed * * * must not result in inequitable treatment of individuals or groups * * *" (45 C.F.R. § 233.10 (a)(ii)); and that "the determination of need and amount of assistance for all applicants will be made on an objective and equitable basis * * *" (45 C.F.R. § 233.20(a)(1)). None of these general provisions compels the conclusion that "equitable treatment" is synonymous with assistance paid retroactively to the date of application for those subsequently determined eligible. On the contrary, 45 C.F.R. § 206.10(a)(6) explicitly addresses the effective date of assistance and provides: "Entitlement will begin as specified in the State plan, which (i) for financial assistance must be no later than *the date of authorization of payment* * * *" (emphasis supplied).[21] And 45 C.F.R. § 206.10(a)(3) provides that the decision to authorize

[20] The judgment incorporated the "unusual circumstances" exception in 45 C.F.R. § 206.10(a)(3).

[21] The Secretary of HEW seems specifically to have rejected a requirement that entitlement to financial assistance should attach on the date of application since 45 C.F.R. § 206.10(a)(6)(ii) goes on to say, in contradistinction to entitlement for financial assistance beginning "no later than the date of authorization of payment," that entitlement "for medical assistance *must be no later than the date of application* * * *." (Emphasis supplied.)

must be made within the applicable 30- or 60-day limitation period. Thus insofar as the general provisions for equitable treatment apply, the pointed provisions of 45 C.F.R. § 206.10(a)(6) and (3) set the parameters for equitable treatment in the specific situation as to when entitlement to financial assistance shall begin. The result plaintiffs seek is therefore not prescribed by federal regulations.

Plaintiffs' constitutional argument is that when entitlement to assistance attaches on the date the applicant is determined eligible, applicants will receive differing initial assistance amounts depending upon the speed of the administrative process. These differences are said to be arbitrary and irrational.

Although plaintiffs bitterly criticize as without social justification any policy not to pay for any period prior to the date on which eligibility is determined, it is clear that it is not our task to "decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the State] might ideally espouse, or that a more just and humane system could not be devised." *Jefferson* v. *Hackney*, 406 U.S. 535, 551, quoting from *Dandridge* v. *Williams*, 397 U.S. 471, 487. There is nothing in the Constitution or the federal law which requires a state to spend more money on welfare by making assistance effective retroactive to the date of application.

With respect to the differentials in initial assistance grants due to variance in the speed of the administrative process, plaintiffs point to the gross disparities that formerly existed in paying AABD when the defendants were not complying (indeed were in egregious violation) of the federal maximum permissible time standards. But under the judgment below, these gross disparities have been rectified. All eligible aged and blind must now be paid within 30 days of their applications and all eligible disabled within 60 days therefrom. We have no showing that significant disparities within the time limits will exist when defendants are processing all applications and paying all eligible beneficiaries within the 30- and 60-day time limits. The slight disparities that are likely to occur within these limitations do not suffice to force the state

to pay all applicants from the date of their applications.[22] More precise mathematical niceties in the administrative process are not compelled by the Equal Protection Clause (cf. *Dandridge* v. *Williams, supra; Jefferson* v. *Hackney, supra*), and therefore we approve the district court's holding that there is no constitutional requirement that welfare assistance be paid retroactively to the date of application.[23]

Finally, plaintiffs contend that the Illinois Public Aid Code, Ill. Rev. Stat. 1971, ch. 23, § 3-1, requires that benefits be paid retroactive to the date of application. That statute provides:

> "Financial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being shall be given under this article to or in behalf of aged, blind, or disabled persons who meet the eligibility conditions of §§ 3-1.1 through 3-1.6."

The Circuit Court of Cook County upheld such an interpretation of the Illinois Act in *People* ex rel. *Naughton* v. *Illinois Dept. of Public Aid*, No. 70 L. 11380 (1971), pending on appeal to the Appellate Court of Illinois.[24] Nevertheless, we find the statute far from clear on this question. We think it especially appropriate to leave interpretation of this opaque statute to the Illinois courts, since the scheme of cooperative federalism created by the matching-grant program already has inherent strains and "it is not the business of the federal courts needlessly to exacerbate

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[22] Assuming *arguendo* that any differentials due to the speed of the administrative process were unjustified, still no requirement that all applicants be paid retroactively to the date of their applications would be constitutionally necessary since defendants could presumably pass constitutional muster with an administrative procedure that dealt exactly uniformly with all applicants, though not paying them from the date of their applications, even though it resulted in less welfare spending and in some receiving initial payments in lesser amounts than under the present administrative scheme.

[23] Although defendants have not advanced the argument, neither have plaintiffs drawn our attention to any requirement that defendants assume a possibly greater administrative burden of determining eligibility retrospectively as of date of application. It may be that in most cases a determination of eligibility will mean that the applicant was eligible on the date he applied, but plaintiffs imply that the two may not be coincident.

[24] Plaintiffs assert that defendants did not appeal this phase of the *nisi prius* state court's ruling. The appeal has not yet been argued.

those problems." *Rothstein* v. *Wyman*, 467 F.2d 226, 232 (2d Cir. 1972). Consequently we restrict our holding to a decision that benefits paid retroactively to the date of application is required neither by federal regulations nor the Constitution.[23]

Award of Punitive Damages

Plaintiffs sought $100,000 punitive damages from defendant Harold O. Swank, former Director of the Illinois Department of Public Aid. In refusing to grant such damages, the district court held that the permanent injunction was a sufficient deterrent to future violations. As in *Westberry* v. *Fisher*, 309 F.Supp. 12, 17 (D. Me. 1970), the record is utterly devoid of any proof of abuse of discretionary authority, malice, or ill-will on the part of defendant Swank. In our view, the district judge did not abuse his discretion in denying punitive damages. See *Francis* v. *Davidson*, 340 F.Supp. 351, 369-370 (D. Md. 1972). It is true that the district court granted plaintiff's motion for an order that facts be taken as established, which included statements that Swank knew that eligible AABD applicants were not treated consistently and were not paid within the federal time limitations. Nevertheless, absent any further proof, as the district judge obviously recognized, the granting of that motion does not warrant such a harsh remedy.

For the foregoing reasons, the judgment of the district court is affirmed and the stay with respect to paragraph 5 of the judgment below is dissolved.

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[23] We realize that *Class* v. *White*, ... F.Supp. .... (D. Conn. 1972), is to the contrary, but there even HEW, as *amicus curiae*, agreed that defendant's classifications for the effective date of assistance were not invalid.